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No. 86-1330

In the Supreme Court of the United States

OCTOBER TERM, 1986

KATRINA MAXTONE-GRAHAM,
Petitioner

v.

JAMES T. BURTCHAELL, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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The Brief in Opposition is instructive not for the arguments respondents make but for those they do not make. Respondents do not dispute the magnitude of their appropriation from *Pregnant by Mistake*.[1] Nor, despite repeated references to the "scholarly analysis" (Br. in Opp. 2, 7, 13) in "Rachel Weeping," do respondents chal-

[1] Although respondents agree that they copied more than 7,000 words from *Pregnant by Mistake* without permission, they object to our description of that number as 19% of the lead essay in *Rachel Weeping* on the ground that "the 'lead essay' has never been published separately from the entire book" (Br. in Opp. 8 n.2; see also *id.* at 16). Respondents' grievance (which does not refute our arithmetic) is not clear; surely respondents are not suggesting that the lead essay would have constituted an infringement if it had been published separately but became a fair use when combined in a book with other essays.

lenge the fact that "Rachel Weeping" was rife with distortions and misquotations from *Pregnant by Mistake.* Finally, respondents do not take issue with our interpretation of this Court's holdings in *Sony Corp.* and *Harper & Row*, nor with our discussion of the manner in which other courts of appeals have applied those holdings, nor with our representation that the questions presented are of substantial public importance.

Instead, respondents' entire defense of the decision below is predicated on their numerous misstatements of the facts and on their assertion that the Second Circuit "expressly recognize[d] and applie[d] [this Court's] guidelines" (Br. in Opp. 12) in *Sony Corp.* and *Harper & Row* and simply ruled against petitioner on the facts. As to respondents' misstatements, perhaps most egregious is their suggestion that this case somehow involves a dispute about the wisdom of abortion. See Br. in Opp. 1, 2, 16. It does not. This is a copyright infringement action arising from the quotation and misquotation of over 7,000 words after permission to quote was refused.[2] As to respondents' legal arguments, respondents are plainly wrong in contending (Br. in Opp. 14-15) that the Second Circuit acknowledged that *Rachel Weeping* was a work of a commercial nature and that commercial uses of copyrighted materials are presumptively unfair and may be presumed to cause harm to the market.

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[2] Additional misstatements include respondents' claims that all quotes from *Pregnant by Mistake* were clearly cited and fully attributed in "Rachel Weeping" (Br. in Opp. 8; see Pet. 6; C.A. App. 24a, 245a, 246a, 248a, and 249a); that *Pregnant by Mistake* was already out of print when *Rachel Weeping* was published (Br. in Opp. 14; see Pet. 3); and that petitioner did not contend below that respondents took the "heart" of her work (Br. in Opp. 8 n.2; see Maxtone-Graham C.A. Br. 29, Reply Br. 12.). Further misstatements in respondents' brief include, *inter alia*, misleading language and improper characterizations of petitioner and her motives—all unworthy of reply.

We are confident that when this Court studies the court of appeals' opinion in light of the arguments presented in the Petition, it will reject respondents' revisionist position. For example, if respondents are correct that the court of appeals viewed *Rachel Weeping* as a commercial work, for purposes of applying 17 U.S.C. § 107(1) and (4), why then did the court expressly refuse "to make a clear-cut choice between two polar characterizations, 'commercial' and 'non-profit' " (Pet. App. 18a), and why did it inquire into the content of the infringing work to determine whether its "educational elements" outweighed its "commercial aspects" (*ibid.*)? If respondents are correct that the court of appeals "recognize[d] *Sony's* rebuttable presumption regarding commercial uses" (Br. in Opp. 13), why then did the court find that this Court, in *Sony Corp.*, did not "intend[] to attach heightened significance to the element of commerciality" (Pet. App. 17a)?

Similarly, if respondents are correct that the court of appeals did indeed apply "*Sony's* presumption of future harm to the market for a work" (Br. in Opp. 14), why then did the court question whether this presumption survived *Harper & Row* and why did it emphasize that "the noncommercial elements of *Rachel Weeping* overwhelm its commercial aspects" (Pet. App. 21a)?[3] And

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[3] Even the points listed by respondents (Br. in Opp. 14) are demonstrably spurious: being out of print is no defense (see 3 Nimmer on Copyright § 13.05[B] n.51 (1986); see also page 2, note 2, *supra*); the comment about "thank you" notes confuses the delay in publishing a second edition of *Pregnant by Mistake* with market harm (see also C.A. App. 180a-181a); Burtchaell's description of petitioner's role as merely "reportorial" ignores her ownership by assignment in the copyright to the "rich and varied" stories told by the 17 women (Br. in Opp. 7, 14); and, lastly, as to the supposed differences in audiences and functions of the two books, see *Salinger* v. *Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987) ("For at least some appreciable number of persons, these phrases will convey the impression that they have read Salinger's words * * * [so] as to diminish interest in purchasing the originals."); see also Pet. 21.

if respondents are correct that the court of appeals did not decide any legal issues but merely ruled against petitioner on the facts (Br. in Opp. 14, 16), how then could the court, on summary judgment, have resolved several material and hotly-contested factual disputes (such as whether Burtchaell engaged in his distortions deliberately)? Respondents offer no answers to these questions.

In short, future litigants cannot take the Second Circuit's decision to be simply an application of previously settled law to the particular facts of this case. Rather, they will regard this decision—issued by "the *de facto* Copyright Court of the United States" (*Easter Seal Soc.* v. *Playboy Enterprises*, No. 85-3741 (5th Cir. Apr. 23, 1987), slip op. 3511)—for what it is: an unprecedented license to appropriate enormous quantities of copyrighted words and to republish them with "numerous inaccuracies" and "in a misleading light" (Pet. App. 15a, 23a).

It is not surprising that those knowledgeable in copyright law do not share respondents' sanguine appraisal of the court of appeals' ruling. Thus, as we pointed out in the Petition (at 12), the *Copyright Law Journal* recently concluded that the Second Circuit's construction of the fair use defense is "difficult to reconcile with *Sony*, *Harper & Row*, and other fair use decisions" (3 C.L.J. 40, 42 (Dec. 1986)).[4] Moreover, the amicus curiae brief submitted by the American Society of Journalists and Authors, Inc., states (at 6, 7) that the Second Circuit's decision "is among the most damaging attacks on the protections granted by the copyright laws in recent years." These conclusions, rather than respondents' assertions, reflect the most realistic and dispassionate reading of the court of appeals' decision and eloquently explain why this Court's review is essential.

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[4] The same point was made by the *Authors Guild Bulletin* (Winter 1987), at 27. See also *The Wall Street Journal*, Oct. 16, 1986, p. 16.

Respectfully submitted.

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